No. 90-1795

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

CHROMALLOY PHARMACEUTICAL, INC.,
Petitioner,

vs.

ROBERT A. BOYER, individually and as Executor of the ESTATE OF MARSHA F. BOYER, deceased,
Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause permits the establishment of *in personam* jurisdiction over a successor corporation based upon the contacts of its predecessor corporation with the forum state where the successor corporation agreed to assume the predecessor's liabilities and benefited from the predecessor's contacts with the forum state and thus, should reasonably anticipate being haled into the forum state to answer for its predecessor's actions and/or omissions?

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STATEMENT OF THE CASE

A. History of the Case

Petitioner, Chromalloy Pharmaceutical, Inc.'s ("CPI") petition arises from a products liability action filed against CPI and others in 1987 in the Court of Common Pleas of Philadelphia County, Pennsylvania.

The relevant action before this Court was brought by Sherrie Simmers, her husband and her son for damages sustained by Mrs. Simmers as a result of the administration of Thorotrast while she was a patient at Children's Hospital of Philadelphia in May 1949.[1] CPI's connection to this action is by virtue of its status as a successor to the Heyden Chemical Corporation ("Heyden") which manufactured Thorotrast between 1930 and 1953.

In 1953, Heyden sold its antibiotic division, which manufactured Thorotrast, to American Cyanamid Corporation ("Cyanamid") (Petitioner's Appendix at A3). The November 3, 1953 Sales Agreement, in part, provided that Cyanamid was to ". . . duly assume as of closing provided herein all obligations of HEYDEN thereafter arising under all licenses, rights, permits, leases, agreements and contracts assigned by HEYDEN to CYANAMID . . ." (A3).

In 1954, Cyanamid sold its Thorotrast product line to Testagar and Company ("Testagar"). The Cyanamid-Testagar Sales Agreement contained a hold harmless clause under which Testagar

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1. Thorotrast is the phamaceutical brand name for colloidal thorium dioxide which is a radioactive contrast dye medium used to perform diagnostic x-rays. By the late 1940's and continuing to the present date, scientific literature and FDA regulations concerning the use of thorium dioxide products explained the medical risk of using Thorotrast, especially an increased risk of cancer (A24).

agreed to indemnify Cyanamid "against any claim for personal injuries, damages or destruction of property . . . arising out of this Agreement, the use, handling or inherent characteristics of the material sold hereunder." (A4, fn. 5). In 1974, through a series of statutory mergers, CPI became the corporate successor to Testagar (A4-A5). At this stage of litigation, while there is no evidence that CPI ever manufactured or distributed Thorotrast, CPI through its O'Neil, Jones and Feldman division, had filed a new drug application for Thorotrast with the Food and Drug Administration with said application being withdrawn in 1977 (A4-A5).

In the *Simmers* action, CPI filed preliminary objections in the nature of challenges to *in personam* jurisdiction, with said preliminary objections being denied (A34). The trial court certified the question of personal jurisdiction to the Pennsylvania Superior Court for immediate appellate review (A32). The cases were consolidated for appeal before the Superior Court of Pennsylvania (A31). On June 12, 1990, the Pennsylvania Superior Court affirmed the trial court's ruling (A28). On February 22, 1991, the Pennsylvania Supreme Court denied CPI's petition for allocatur (A29).

B. The Decision of the Pennsylvania Superior Court

The Pennsylvania Superior Court defined the issue before it as

> Whether the forum-related contacts and actions of a predecessor corporation may be attributed to its successor for the purposes of establishing *in personam* jurisdiction.

(A2).

In deciding this issue, the Superior Court recognized that

the application of principles of tort liability was not a substitute for an analysis of whether CPI had the requisite minimum contacts with the Commonwealth of Pennsylvania necessary to satisfy the Due Process Clause (A16). Indeed, the Superior Court specifically recognized that any discussion as to CPI's liability was simply by way of analogy as similar concerns arise in determining when a corporation may be called to answer for the acts or omissions of its predecessor and when a corporation may reasonably expect to be haled into court to defend a claim against it based upon the acts and/or omissions of its predecessor (A15).

After analyzing whether sufficient minimum contacts existed between the Commonwealth of Pennsylvania and CPI, the Superior Court held that the trial court's decision to assert *in personam* jurisdiction over CPI was proper. The Superior Court correctly stated that a corporation which assumes another's liabilities and assets should reasonably expect to be haled into court to answer for those liabilities in those jurisdictions in which its predecessor was doing business or had sufficient minimum contacts to render it subject to jurisdiction (A25).

Thus, in reaching its decision, the Superior Court correctly determined that, consistent with principles of due process, CPI had the requisite minimum contacts with the forum state such that CPI could reasonably anticipate being haled into court in the Commonwealth of Pennsylvania.

REASONS FOR DENYING THE WRIT

The Superior Court of Pennsylvania correctly applied the decisions of this Court in reaching its conclusion that traditional notions of "fair play and substantial justice" would be furthered by the imposition of *in personam* jurisdiction over CPI. There is certainly nothing contrary to a holding of this Court in finding that an entity which assumes the liabilities of a predecessor

corporation should not reasonably expect to be haled into a forum where that predecessor was doing business or subject to jurisdiction to answer for that predecessor's actions and/or omissions. Alternately, there is no reason for this Court to review a decision of the Pennsylvania Superior Court which is in harmony with precedent of this and other courts of competent jurisdiction and which is not in conflict with the Due Process Clause.

I.

CONSISTENT WITH THE MANDATE TO DUE PROCESS CLAUSE AND PRIOR DECISIONS OF THIS COURT, THE SUPERIOR COURT OF PENNSYLVANIA CORRECTLY HELD THAT CPI WAS SUBJECT TO *IN PERSONAM* JURISDICTION.

A state court may exercise personal jurisdiction over a non-resident defendant only so long as there exist "minimum contacts" between the defendant and the forum state. *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." *Burger King v. Rudzewicz,* 471 U.S. 462, 475 (1985). "The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum and it acts to ensure that the states through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 290, 291-292 (1980).

The protection against inconvenient litigation is usually described in terms of "reasonableness" or "fairness". This Court

has stated that a defendant's contacts with the forum state must be such that maintenance of the suit "does not offend traditional notions of fair play and substantial justice". *International Shoe Co. v. Washington, supra* at 316 quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940). The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." 326 U.S. at 317. The defendant's conduct and connection with the forum state must be such that he should reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson, supra* at 297.

In requesting this Court to review the Superior Court's decision, CPI argues that the Superior Court's decision was improper because it substituted tort theories of successor liability in place of a determination as to whether CPI had the requisite minimum contacts to create a substantial connection with the Commonwealth of Pennsylvania such that CPI could reasonably anticipate being haled into court there.[2] (Brief of Petitioners at pages 5-9). This is, of course, untrue.

In determining whether the assertion of *in personam* jurisdiction over CPI was proper, the Superior Court noted:

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2. Indeed, whether it is reasonable to require a corporation to defend a particular suit in a particular forum is a primary concern, what is reasonable may be considered in light of other relevant factors including the forum state's interest in adjudicating a dispute, *see McGee v. International Life Insurance Company,* 355 U.S. 220, 223 (1957), and the shared interest of the several states in furthering fundamental substantive social policies. *Kulko v. California Superior Court,* 436 U.S. 84, 93, 98 (1978). The Superior Court recognized that its decision, while not based upon public policy considerations, would, in fact, further the public policy of the Commonwealth of Pennsylvania in providing protection for its citizens who are injured through the use of products whose manufacturers no longer exist in their original corporate form (A24-A25).

> In view of the similarity of concerns with respect to jurisdiction and liability, certain analogies between the law of successor liability are useful to determine whether a predecessor corporation and its successor are one and the same for jurisdictional purposes.

(A16). In so stating, the Superior Court recognized that the application of principles of tort liability is not a substitute for an analysis of whether CPI has the requisite minimum contacts with the Commonwealth of Pennsylvania necessary to satisfy the Due Process Clause, and that any discussion as to the principles of successor liability was simply by way of analogy (A15-A16).[3] Clearly, the Superior Court's decision to uphold the trial court's assertion of *in personam* jurisdiction over CPI was not based on substantive product liability law.

After analyzing whether sufficient minimum contacts existed between the subject matter of litigation and CPI, the Superior Court held that the trial court's decision to assert *in personam* jurisdiction over CPI was proper. The Superior Court stated:

> When a successor corporation assumes the liabilities of its corporate predecessors, the successor in effect consents to be held liable in the same locations where its predecessor would have

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3. In discussing this particular aspect of its opinion, the Superior Court quoted, with approval, Judge Caleb M. Wright in *Fehl v. S.W.C. Corp.*, 433 F. Supp. 939 (D. Del. 1977) who stated:

> Common to the scope of both jurisdiction and liability is the fairness of making a corporation which enjoys the benefit of business with a state [i.e., assets of its predecessor derived from business within the state] answerable in that jurisdiction for wrongdoing associated with that business.

> been exposed, i.e., consents to the same jurisdictional qualities of its predecessor. The provisions of the Due Process Clause are not violated by imputing the predecessor's actions and forum contacts upon a successor.

(A25). The Superior Court quite properly recognized, as this Court has, in prior decisions, it is eminently fair and reasonable, taking into account the realities of modern corporate behavior, that a corporation should expect to be haled into court in those forums in which its predecessor was subject to jurisdiction. Further, it would be unreasonable, as the Superior Court realized, to assume that corporate transactions are planned and executed in a vacuum, without contemplating the ramifications of those transactions, including the extent to which a successor corporation may be called to answer for its predecessor's actions and/or omissions in those forums in which its predecessor was doing business or had the requisite minimum contacts to be subject to *in personam* jurisdiction.[4]

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4. This Court, as early as 1958, noted that one of the factors which led this Court to revise the rigid standard for *in personam* jurisdiction annunciated in *Pennoyer v. Neff*, 95 U.S. 714, for the more flexible standard contained in *International Shoe Co. v. Washington, supra,* was the fundamental transformation in the American economy brought about by improvements in transportation and communication, factors which the Superior Court recognized as being relevant in rendering its decision. *Hanson v. Denckla,* 357 U.S. 235, 250-251 (1958); *McGee v. International Life Ins., supra,* 355 U.S. at 222-223. As the Superior Court stated:

> No doubt in today's sophisticated world of corporate takeovers, a corporation, which assumes another's liabilities or purchases another's product line, seriously considers the possible extent of any liabilities and where those liabilities may exist. We are convinced that the traditional notions of "fair play and substantial justice" central to the assertion of jurisdiction are in fact furthered by today's decision.

(A25-A26).

Under these circumstances, the imposition of jurisdiction is manifestly fair especially when this Court considers, as the Superior Court realized, that CPI derived some benefit from Heyden's presence in the Commonwealth through the use of Heyden's assets and its contacts with the forum (A24-A25).

II.

THE PENNSYLVANIA SUPERIOR COURT'S DECISION IS IN HARMONY WITH DECISIONS OF THIS COURT AND OTHER COURTS OF COMPETENT JURISDICTION AND DOES NOT PRESENT A SUBSTANTIAL QUESTION OF JURISDICTION WHICH NEED BE RESOLVED BY THIS COURT.

CPI has alleged that the Superior Court's holding is in conflict with the holding of several federal courts of appeals which have considered the issue of whether a predecessor corporation's contacts may be attributed to a successor corporation for the purpose of establishing jurisdiction (Petitioner's Brief at pages 9-10). CPI also alleges that whether a predecessor corporation's contacts may be attributed to a successor corporation for purposes of establishing jurisdiction over the successor has been addressed by the courts of the several states and that a conflict has arisen as to the manner in which this issue is to be addressed (Petitioner's Brief at pages 10-12).

The apparent inconsistencies and conflicts which CPI believes warrants review of the Superior Court's decision may be harmonized by examining the reasoning behind the decision reached by those courts which have addressed the issue currently before this Court.

In those cases in which it was held that a successor corporation may reasonably expect to be haled into a forum to answer for

the acts and/or omissions of its predecessor, the courts found that the successor had expressly or impliedly assumed the predecessor's assets and liabilities or there was no distinction between the successor and the predecessor.[5] These decisions are consistent with traditional notions of fair play and substantial justice when one considers, that the successor corporations enjoyed the benefits of their predecessors' presence in the forum state and should expect to be haled into those forums where their predecessors did business especially when the successors voluntarily assumed their predecessors' liabilities. The decisions contrary to this line of cases are not applicable,[6] wrongly decided or involved

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5. In *Duris v. Erato Shipping Inc.*, 684 F.2d 352 (6th Cir. 1982), *affirmed on other grounds, Pallas Shipping Agency Ltd. v. Duris*, 461 U.S. 529 (1983) the Court held that where the predecessor corporation merged into the successor corporation, the contacts of the predecessor would be deemed those of the successor for jurisdictional purposes. In *Cole v. Catapillar Machinery Corp.*,562 F. Supp. 179 (M.D. La. 1983), the District Court held that where a successor corporation to a merger assumed both the assets and liabilities of its predecessor, it could still be subject to *in personam* jurisdiction without offending due process despite the fact it had no contacts with the forum since it derived a benefit from its predecessor's presence in the forum state and should reasonably expect to answer for liabilities incurred by its predecessor with the forum. In *Bowers v. Neti Technologies Inc.*, 690 F. Supp. 349 (E.D. Pa. 1988), the District Court found that evidence that a non-resident corporation was created for the purposes of usurping the assets, business and operations of its predecessor while avoiding responsibility for its predecessor's debts, could have reasonably anticipated being haled into Pennsylvania to answer for that predecessor's actions. In *Goffe v. Blake*, 605 F. Supp. 1151 (D. Del. 1985), the District Court held that the actions and conduct of the constituent corporation could be attributed to its successor following a merger for the purpose of determining the successor's amenability to jurisdiction for the liability of its predecessor. In *City of Richmond, Va. v. Madison Management Group*, 918 Fed.2d 438 (4th Cir. 1990), the court held that where a successor corporation had implicitly assumed its predecessor's liabilities, the successor corporation would be amenable to jurisdiction based upon its predecessor's contacts with the forum state.

6. In *Johnston v. Pneumo Corp.*, 652 F. Supp. 1402 (S.D. Miss. 1987),

(Cont'd)

transactions in which the successor did not assume the predecessors' liabilities and, therefore, could not be expected to be haled into court to answer for its predecessors' actions.[7]

(Cont'd)
the District Court held, in contradiction to the great weight of persuasive authority, that a successor corporation could not be amenable to jurisdiction based upon its predecessor's contacts with the forum state despite the fact that the successor had agreed to assume all the assets and liabilities of the predecessor corporation. In *Sullivan v. Fellows Testagar & Co., Inc.*, 518 So. 2d 111 (La. App. 1987), the court held that an agreement to indemnify a corporation which had agreed to indemnify another corporation was not sufficient to assert *in personam* jurisdiction over a non-resident defendant.

7. In *Williams v. Bowman Livestock Equipment Company*, 927 F.2d 1128 (10th Cir. 1991), the Court of Appeals held that where the "successor" came into existence when the predecessor's assets were liquidated and debts discharged by a secured creditor or through Chapter 7 bankruptcy proceedings; there was neither a statutory merger nor consolidation of the predecessor and successor nor a sale or transfer of all, or substantially all of the predecessor's assets to the successor, jurisdiction should not be imposed upon the successor for the predecessor's acts in the forum state. In *Wines v. Lake Havasu Boat Mfg. Inc.*, 846 F.2d 40 (8th Cir. 1988) the court held that defendant's predecessors' contacts with the forum state could not be attributed to the defendant, for purposes of personal jurisdiction, where defendant's predecessor purchased certain assets from the corporation but did not assume any liabilities. In *Inter-America's Insurance Corp. v. Xycor Systems, Inc.*, 757 F. Supp. 1213, 1218 (D. Kan. 1991), the District Court held that it would be inappropriate to exercise jurisdiction over a successor based upon its predecessor's contacts with the forum where the successor did not expressly or impliedly assume the liabilities upon which plaintiff's cause of action was based. In *Fehl v. S.W.C. Corp. supra*, the District Court held that a successor corporation could not be held amenable to jurisdiction based upon the acts of its predecessor where the transaction amounted to a transfer of assets for cash only, and there was no agreement to assume any of the predecessor's liabilities by the successor corporation.

CONCLUSION

For the foregoing reasons, CPI's petition for writ of certiorari should be denied.

Respectfully submitted,

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